



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

CRIMINAL REVISION NO. 41 OF 2019

PETER MUNYWA KARIUKI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being a revision from Original conviction and sentence in Criminal Case No. 283 of 2019 of the Senior Principal Magistrate's Court at Engineer)

JUDGMENT

1. The applicant's application seeks revision of his sentence totaling five (5) years imprisonment for the offence of house breaking and stealing contrary to **Section 304 (1) (b)** as read with **Section 279** of the **Penal Code**. Three (3) years were for housebreaking and two (2) years for stealing.
2. **Section 304 (1) (b)** of the **Penal Code** relates to the offence of housebreaking; and under **Section 279 (b)** of the **Penal Code** where the thing is stolen in a dwelling house and its value exceeds Kshs 100/=, the offender is liable to imprisonment for a term of fourteen (14) years. Thus the applicant herein was liable to imprisonment for a term of fourteen (14) years.
3. The facts were that the complainant left her house at Njabini and informed the caretaker she was travelling. She returned on 29th March, 2019, and, trying to open the padlock to her house found it had been broken and placed back temporarily. When she got into the house she found that some of her property was missing, namely; 24 Inch television, DVD, Woofer, Gas cooker and suit case all valued at Kshs 38,300/=.
4. Upon reporting at the police station, two police officers accompanied her to the scene where they interrogated neighbours. Following police investigations, the applicant and one Anthony Mwangi Wanjiru were arrested and charged. The applicant's co-accused pleaded not guilty and was subjected to trial which is still ongoing.
5. The applicant initially pleaded not guilty but shortly after changed his plea to guilty and was convicted and sentenced. He now seeks the court's leniency. He says that he is the sole bread winner of his family and his incarceration has placed them in a very difficult situation; that he was a responsible and law abiding citizen and if given a second chance he could make a turnaround his life. He urges the court to mete a non-custodial sentence.
6. Early in these proceedings the court ordered a Probation Officer's Report to assist it in considering and assessing the applicant's circumstances and situation. A Report dated 15th July, 2020 was filed. I find it helpful to quote substantially from it as follows:

“Attitude of the inmate towards the offence

The inmate pleads for a revision of his sentence to a non-custodial as he would like to go back home and fed for his parents and more so he would prefer to engage in doing vocational course.

The inmate also states that he would wish to continue living an honest and meaningful life and he has learnt a lesson form this matter. He is more than willing to respect other peoples' opinion and property. He says he had changed since he went to prison and has a learnt a lesson and would never wish to be caught in the wrongful side of the law. He is very remorseful and asks for forgiveness from this honourable court.

Complainant's views

The complainant was contacted and she believe the period the inmate has been in custody has enabled him to learn a lesson. She is not opposed for the inmate to be granted a non-custodial sentence for the remaining sentence.

Attitude of the Community towards the inmate

The local community is willing to accommodate him and willing to give him the necessary support required for his rehabilitation. The area community was shocked to hear that of the news, they have no ill feelings towards the inmate.

Prison rehabilitation

During the prison visit and enquiry, the prison officers present and welfare officer when questioned about him they all said, the inmate has been of good conduct during his stay in prison. He is engaged in cooking for other inmates in prison.

He has been engaged in working in the prison's industry as a carpenter. The inmate is now ready to be employed in carpentry workshop to further his skills and help build the economy."

The Probation Officer concludes his report with the following observation and recommendation:

"the inmate is a youthful convict. He is a first offender on record as no previous records were found. The inmate is the 2nd born in the family of 7 siblings.

The inmate pleads for a revision of his sentence to a non-custodial. The parents are ready to receive him back in the society. The area community members are not opposed for the inmate to be granted a non-custodial sentence.

According to the area local administration, the area chief believes that the inmate has learnt a lesson and if given a second chance would show exemplary change.

During the prisons visit and enquiry, the prison officers present and welfare officer when questioned about him they all said, the inmate has been of good conduct during his stay in prison. He has done carpentry work and also he is a cook at the medium prison facility.

Your Lordship, in my view I find the offender suitable for non-custodial sentence. If placed, it would give him the chance to address his criminogenic risk factors at the same time undergoing counselling. From the above findings your Lordship, I kindly request the honourable court to consider the inmate for a non-custodial sentence for a way of Community Service Order at Moshifao Primary School for a period that deemed fit for his honourable court."

7. The applicant is seeking a non-custodial sentence. However, it is noted that **Section 279** of the **Penal Code** treats the offence of housebreaking and stealing as a felony with no options for a fine or non-custodial sentence. Further the applicant's sentence of a total of five (5) years is less than the fourteen (14) years imprisonment to which he is liable under **Section 279** of the **Penal Code**. He was arrested on 30th March, 2019 and sentenced on 23rd May, 2019, so he has spent 1 ½ years incarcerated.

8. From the Probation report and the applicant's own affidavit, it is clear that the applicant is remorseful, and that he has learnt from the consequences of his error. The record of proceedings shows that he pleaded guilty, very early in the proceedings, an acknowledgment that he was aware of the error of his actions.

9. The **Judiciary Sentencing Policy Guidelines** point out at **Paragraph 21.1** as follows:

"The overall objective of the criminal justice system is to convict those who have committed offences. Thus persons pleading guilty contribute towards meeting this objective as well as enabling the victim to obtain justice without unreasonable delay. It also protects a victim from re-victimisation that may occur during trial. Pleading guilty also saves the court's time."

10. At **Paragraph 21.5** it is stated:

"The court must remain guided by the overall objective, which is the conviction of the guilty. It, therefore, has to satisfy itself that the accused person fully understands what pleading guilty means and the effect of pleading guilty."

11. In light of the foregoing I think this is a case where the contention of factors i.e. Guilty Plea, the term served and remaining sentence term less remission time, and the applicant's conduct and Probation Report, may all be considered to the benefit of the accused.

12. I have taken particular note of the views of the complainant contained in the Probation Report that she is not opposed to his being granted a non-custodial sentence and that she believed the applicant had learned a lesson since his incarceration.

13. Taking all the above matters into careful consideration, I think this is a case in which the court is called upon to exercise justice with mercy without setting a precedent that may have negative effects in other similar cases of house breaking and stealing except where the circumstances are comparable.

14. Ultimately, the orders I deem to be appropriate are as follows:

1. The applicant's cumulative sentence of 5 years is upheld but shall be served as follows.
2. The applicant shall serve a non-custodial sentence one (1) year thereof with immediate effect during which:
 - a) The Probation Officer will arrange an appropriate Community Service Programme for the applicant at Moshifao Primary School.
 - b) A record of the programme and the applicant's participation shall be maintained by the Probation Officer, and such record may be called upon by the Court at any time.
3. The remaining period of the applicant's sentence shall be suspended provided that:
 - a) He shall complete the Community Service Programme.
 - b) He shall pursuant to **Section 178** of the **Criminal Procedure Code** pay restitution to the complainant Elizabeth Nyambura Muchiri in the amount of half of the value of the items that were stolen namely Kshs 19,150/=.
 - c) The aforesaid amount shall be paid to the complainant no later than six months after the applicant commences his non-custodial sentence.
 - d) The applicant shall not be in conflict with the law or be convicted during the duration of the non-custodial sentence. If convicted the suspended sentence will automatically be revoked.

Administrative directions

15. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

16. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

17. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 1st Day of February, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Peter Munywa Kariuki - Applicant in person
2. Ms Maingi for the Respondent
3. Court Assistant - Quinter Ogutu